

No. 04-__

IN THE
Supreme Court of the United States

TIMOTHY GIBLER,
Petitioner,

v.

JO ANNE B. BARNHART,
Commissioner of the Social Security Administration,
Respondent.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

PETITION FOR A WRIT OF CERTIORARI

STEVEN BRUCE, *
PEOPLE WITH DISABILITIES
FOUNDATION
507 Polk Street, Second Floor
San Francisco, California 94102
(415) 931-3070

* Counsel of Record

Attorney for Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. Petitioner, Timothy Gibler, asks this Court to decide whether the Social Security Administration can take away social security disability benefits and Medicare needed for the necessities of life from an individual without first providing:

- a) Notice which a reasonable person can understand and
- b) An opportunity to present objections at a meaningful evidentiary hearing in accordance with basic due process standards.

2. Petitioner, Timothy Gibler, asks this Court to decide if a social security disability beneficiary may have access to the federal court system to adjudicate due process issues over which the Social Security Administration's Administrative Law Judges and Appeals Council have no jurisdiction.

3. Petitioner, Timothy Gibler, asks this Court to decide whether the Social Security Administration can retroactively, with no time limit, require beneficiaries, as a condition to continue to receive social security disability benefits and Medicare, to produce minute detail, such as the amount of money spent on anti-psychotic medication, taxi fare or leaving work early.

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INTRODUCTION

Petitioner (“Gibler”) seeks judicial review of the due process violations that he experienced when Respondent Social Security Administration (“SSA”) summarily cut off his disability benefits. Although those benefits were ultimately restored (but at a lower monthly rate), it took two years for the internal Social Security processes to reverse the initial determination to end his benefits. The consequences were catastrophic for a mentally disabled individual who relies on his disability benefits which are essential for his survival.

The administrative mishandling of Gibler’s claims file (which included evidence of his ongoing, critical medical condition, as well as evidence that SSA had previously determined that Gibler’s “work”—as an occasional singer in

church choirs—was de minimus) was egregious. So egregious were its administrative omissions that due process considerations lead to the conclusion that disability beneficiaries should be protected by actual hearings *before* their benefits are cut off as SSA has only afforded this protection to disabilities if a review is denoted a “medical review” verses a “work review.”

Any benefit of administrative ease by not affording notice and a hearing prior to termination of benefits cannot override basic notions of due process. This hesitancy by the courts below is understood to facilitate administrative processing; however, Gibler requests that this Court find his Fifth Amendment rights were—and continue to be—violated.

The issues raised here are by no means moot. SSA initiated yet another review of Gibler’s earnings history (including re-review of years that had already been adjudicated by the Administrative Law Judge in this case) while two appeals were still pending before the Ninth Circuit, resulting in the United States Court of Appeals issuing an emergency stay.

Gibler was further denied his due process rights by Social Security regulations that mandate that great weight be given to stale evidence, that is, adverse action summarily taken on earnings records that are over ten years old. Even the Administrative Law Judge below, who followed those regulations, made clear that he was uncomfortable with their application in the instant case.

Due process violations run throughout this case; yet so far the courts have declined to address those concerns on the merits.

JURISDICTION

This Petition flows from a Denial of two Petitions For Rehearing En Banc before the United States Court of Appeals for the Ninth Circuit dated January 5, 2005 (Appendix Exhs. 2,7 pp. 2,7)

STATEMENT OF FACTS

A. *Cessation of Benefits*

Gibler was diagnosed as schizophrenic when he was in his twenties. Not long after, in 1979, he received Social Security disability benefits and has remained on them ever since. Periodic medical reviews performed by SSA in 1986, 1991 and 1996, have confirmed his ongoing disability. In 1987, Gibler was subjected to a “work review.” His occasional work as a pick-up singer in church choirs was determined to be “sheltered work”. (Opinion of Administrative Law Judge, dated August 30, 2001, Appendix Exh. 17, pp. 95-110)

In a continuing disability review report, dated and signed by Gibler on January 15, 2000, which is the subject of this appeal, Gibler informed SSA that he is afraid to leave his apartment, he has agoraphobia, he is trying to see a counselors, and “I could not remember where to go...I must quit. . . .” (ALJ Decision Exhibit List No. 28, Appendix Exh. 17, pp. 95-110). Similarly SSA typed an acknowledgment that it was informed that Gibler was psychotic and would be out on the street without benefits. (ALJ Decision, Exhibit List No. 34.) In early February 2000 during the pendency of the review, Gibler was placed in a psychiatric lock-up ward in a San Francisco hospital for approximately a week to ten days. (See hospital discharge summary dated February 18, 2000 from SSA file, Appendix Exh. 22, p.120)

On April 20, 2000 SSA, through one of its local San Francisco field offices, sent Gibler a letter and questionnaire requesting information about his work history since 1979.

According to Social Security records, the in-person and written communications were followed by a telephone call to Gibler, initiated by Social Security claims representative, Donald Worms. Gibler and SSA claims representative Worms went over Gibler's work history for the previous twenty years. For many years, the only work that Gibler had been able to undertake had been occasional singing in choirs.

Shortly thereafter, Gibler received a written communication, dated July 27, 2000 (Appendix Exh. 19 pp. 113-116), from SSA, requesting additional information for Gibler's earnings history for the years 1979 through 2000. This letter listed seven employers (all churches or musical associations), as well as a supposed period of "self-employment," from January 1988 to December 1991. The employers listed were the very ones that Gibler had named to claims representative Worms. There was no mention of a hospital discharge summary from February 2000 in the SSA file.

20 C.F.R. § 404.1595 (c) states ". . . If you agree with the advance notice, you do not need to take any action. . . ." This regulation also states at 404.1595 (b)1 that "Medical reasons. The advance notice will tell you what the medical information in your file shows. . . ." SSA ignored its own regulation by not telling Gibler that being in a lock-up psychiatric ward was a ground for not terminating benefits and that SSA was required to obtain an opinion from a [his] psychiatrist, a treating source, *infra* at page 20.

This letter dated July 27, 2000, from SSA contained little specific information. It did not set out the amount (or even range) of Gibler's purported earnings. The letter did not in any way intimate that the Social Security concepts of "sheltered work," "work subsidies," "impairment related work expenses", or "sporadic work" had been or could be

considered.¹ The letter discussed briefly SSA's "substantial gainful activity work" test (usually called "SGA") and told him of his so-called "trial work period," which Gibler was then first told ended in 1981.² The letter did suggest that Gibler might have mistakenly been receiving disability benefits since April 1988 (over twelve years previously), due to "substantial work as of January 1988." (Appendix, Exh. 19, pp. 113-116)

Gibler, with the assistance of counsel, sought testimony from his treating psychiatrist, Dr. Carol Banyas, who testified in the district court via declaration (Declaration of treating psychiatrist. Appendix, Exh. 20, pp.117-118). He also filed a new application for disability benefits; which was approved *based on the very same evidence used to terminate him.*

For almost all years of his earnings history, Gibler's wages fell below the monthly SGA³ caps of \$300 (that applied in 1980-1989), \$500 (1990-1998) and \$700 (1999-2000). In two years, 1988 and 1990, his wages were higher.

Without any further communications the SSA summarily ceased paying Gibler's benefits on November 1, 2000 with no appealable notice.⁴

Multiple attempts via telephone, fax and mail⁵ to have Gibler's benefits reinstated through Mr. Larimore, senior attorney at SSA's Regional Commissioner's Office, Critical Congressional Unit were unavailing because the claims file

¹ "Sporadic work" comes from substantial gainful activity 42 U.S.C. 423 (d) (1) and 20 C.F.R.404.1510 & 1572 and case law.

² 20 C.F.R. 404.1592(a)

³ See 42 U.S.C. § 423(d)(1)(A); 423(d)(2)(A), and § 20 C.F.R. §§ 404.1510 and 404.1572 .

⁴ The check he did not receive in November would have been for his October benefits.

⁵ Numerous confirming letters are exhibits of record.

had already been closed and transferred to Baltimore, MD where it was lost for five to six months. Although SSA never⁶ gave Gibler a formal notice initial cessation,⁷ in order to put the appeal process on track, Gibler filed a “premature” Request for Reconsideration on or about November 2000. The Request for Reconsideration was denied by summary notice, issued by SSA’s headquarters in Baltimore dated March 23, 2001.⁸

B. District Court Disposition

As Gibler had been deprived of benefit checks and Medicare coverage for four months, on March 1, 2001, he petitioned the District Court for a Writ of Mandamus, seeking immediate re-instatement of benefits. Gibler also sought to have the district court order SSA to commence a new evaluation of Gibler’s medical condition given the testimony of his former treating psychiatrist who stated there was substantial increased risk of decompensation. (District Court Case No. CV 01-0895 MJJ/JL, “Gibler I”). SSA brought a Motion to Dismiss for lack of subject matter jurisdiction (based on not fulfilling the exhaustion administrative remedies doctrine) which was denied, after hearing on June 12, 2001, by Order entered July 11, 2001. The District Court’s basis for denying the motion to dismiss was a determination that Gibler had raised a colorable constitutional claim of a due process violation. (Order Denying Motion to Dismiss, Appendix Exh. 15, pp. 60-81.

⁶ Long after the Request for Reconsideration had been filed in this case, the SSA issued a “reconstructed” Notice of Cessation.

⁷ This omission is conceded by the SSA. (SSA’s Brief In Support of Cross Motion for Summary Judgment dated May 28, 2002 at page 11:1-3 and Brief of Appellee, Case No. 03-15836, page 5 and footnote 3.)

⁸ Per District Court’s October 16, 2002, Order, Appendix Exh. 13, pp. 22-42 reconsideration was denied on March 23, 2001. Normally, Requests for Reconsideration are handled in a local (San Francisco) office not in Baltimore, MD.

At the June 12, 2001 hearing and in its July 11, 2001 Order, the District Court indicated that its concern was a prompt resolution of Gibler's case by way of a hearing before an Administrative Law Judge. The District Court was apparently unwilling or unable to explore the full ramifications of a prompt hearing and decision by an Administrative Law Judge. The Court, moreover, suggested that mandamus would not lie because Gibler had failed to exhaust his administrative remedies. (Appendix Exh. 15, pp. 60-81, Order of July 11, 2001, page 4.)

In response, counsel for Gibler brought a second action for declaratory and injunctive relief (Gibler II, District Court Case No. C 01-2774 MJJ) and at or about the same time filed a Motion for Injunctive and Declaratory Relief in the first action (Gibler I). The court chose to deny the motion in the first case (Gibler I) and to dismiss the second case (Gibler II).

Gibler was not permitted to utilize discovery. A Motion to Compel Discovery was denied with respect to all depositions and other discovery, except for production of one document because a Magistrate Judge found the Court had already decided not to rule on how due process impacts social security procedures. (See Order of Magistrate Judge, Gibler I, dated July 2, 2002, with a clear restatement of the posture of the case and Order confirming stipulation of the parties. (Appendix Exh. 14, pp. 43-59)

The case commenced by Petition for Writ of Mandamus was thereafter left to languish until it was brought to conclusion by Gibler's Motion for Summary Judgment, filed February 14, 2002 and denied, after hearing on October 15, 2002, by Order dated October 16, 2002 (Appendix Exh. 13, pp. 22-42) At the same time, Respondent's Cross-Motion for Summary Judgment was granted.

The issues herein are not moot. At no time during this case did the District Court go further than addressing a "colorable

claim of due process,” in so far as how promptly the hearing by the Administrative Law Judge could be scheduled.⁹

“However, the Court expressly declined to reach the issue of whether SSA’s scheme for review was unconstitutional as applied to Gibler.” Order of January 11, 2002, at page 3.)

Similarly, at an earlier hearing in the same case, the District Court stated with respect to due process and social security procedure:

“. . . I never took jurisdiction of the merits of the determination. So you could not get judgment for that.”¹⁰

Ultimately, Gibler filed a third action for injunctive and declaratory relief on February 25, 2003. (District Court Case No. CV-03—0823 MJJ (Gibler III), one of the two subject cases of this appeal). By this time, every conceivable administrative avenue had been explored, even by moving to “reopen” within SSA’s regulatory framework... The ALJ, on Gibler’s request to reopen pursuant to 20 C.F.R. § 404. 987, *et. seq.* amended his decision after which time, SSA’ appeals council denied review. The District Court complaint (Gibler III) was timely filed thereafter. (See Amendment to ALJ decision dated October 30, 2002, as to reopening (Appendix, pp. 111-112) Since the District Court had refused to address the major due process issues in the mandamus case (Gibler I) including precluding Gibler from taking any depositions, Gibler sought declaratory and injunctive relief to urge the district court to permit appropriate discovery and adjudicate the due process issues. (Gibler III)

⁹ October 16, 2002, Order, (Appendix Exh. 13, pp. 22-24

¹⁰ Transcript, January 8, 2002 hearing, (Appendix Exh. 23, pp. 121-125).

The Gibler III complaint was dismissed for failure to state a cause of action even though SSA addressed the allegations on the merits. In its second Motion to Dismiss the complaint SSA stated: *Res judicata* bars all grounds for recovery which could have been asserted and the Court already adjudicated the due process issues and 2) SSA had given Gibler an opportunity to be heard. (Brief of SSA filed July 17, 2003, pages 4:8-12, 21-28). The District Court stated “To the extent “collateral estoppel”, [not *res judicata*]. (Order of August 21, 2003).

In any event, the constitutional issues were never adjudicated.

Citing *Friends of the Earth v. Laidlaw Environmental Services*, 528 U. S. 167, 120 S. Ct. 693 (2000), Gibler believed he could be subjected to yet another work review although his benefits had been restored. Gibler, in fact, received another work review notice resulting in the Ninth Circuit issuing an unopposed Emergency Order dated April 28, 2004 for a stay. (Appendix Exh. 9, pp. 12-13.

A Rule 60(B) Motion for Relief from Judgment was denied by Order dated filed April 16, 2003 (Appendix Exh. 12 pp. 18-21) which preceded an appeal in the Ninth Circuit. (Gibler I). Gibler requested the Circuit Court take into account a merit reason for tolling for a late filing after a Judgment based on Motions for Summary Judgment, i.e., that Gibler was in a psychotic episode and temporarily would not (because of incapacitation) authorize the appeal. (See declaration of Gibler’s attorney dated July 7, 2003, Appendix Exh. 10, pp. 14-16 and Order denying request to toll from a two judge “procedure only” panel). See *Bowen vs. New York*, 476 U.S. 467 (1986) and *Matthews v. Eldridge*, 424 U.S., at 328, 96 S.Ct., at 899 for tolling.

In each of the three cases detailed above, Gibler raised the due process concerns that his Petition for Writ of Certiorari addresses.

C. Hearing before the Administrative Law Judge

This has become the final decision of SSA. On August 27, 2001, a *de novo*¹¹ hearing was held before United States Administration Law Judge F. Neil Aschemeyer, who issued a mostly favorable Decision on August 30, 2001. (Appendix Exh. 17, pp. 95-110) For the first time since SSA began the work review process in January 2000, there was a hearing with an opportunity to present evidence in the form of testimony and an opportunity to make objections.

The Administrative Law Judge determined that Gibler had been disabled within the meaning of Title II of the Social Security Act and that he had not performed SGA since January 1, 1991.¹² Moreover, the Administrative Law Judge found that after Gibler's disability benefits were cut off, his "only income at this time is the still small amount of wages and food stamps, which are insufficient to cover his ordinary living expenses." (ALJ Opinion, *supra*.)

The Administrative Law Judge was obliged to accept Social Security's evidence of Gibler's earnings records. 42 U.S.C. § 405(c)(3), (c)(4)(A); 20 C.F.R. § 404.803. He expressed, however, serious reservations about the accuracy of those records for the years 1988, 1989 and 1990, years during which the SSA asserted that Gibler had been self-employed. (ALJ Opinion, *supra*.)

Four months after this decision was rendered, Gibler's benefits were ultimately restored, in part, by the Baltimore, MD payment center in December 2002.

EXHAUSTION

The ALJ and SSA's Appeals Council (administrative appeal) being bound by all SSA's regulations and internal

¹¹ See 20 C.F.R. § 404.943.

¹² Appendix pp 95-110, Exhibit 1—ALJ Opinion, page 7.

rulings, have no jurisdiction to rule on constitutional issues. A filing under these circumstances would be futile and meaningless. See *Bowen vs. New York*, 476 U.S. 467 (1986); *Weinberger vs. Salfi*, 422 U.S. 795, 95 S. Ct. 2557, 2581 (1975).

After the ALJ reopened and amended his Decision, dated October 30, 2002, review of which was denied by the Appeals Council (Appendix Exh. 18, pp. 111-112.), the third due process complaint was filed in the District Court, Gibler III.

STATUTORY AND REGULATORY SCHEME

A. Disability Status and Work Activity

To determine whether an individual is disabled within the meaning of 42 U.S.C. §§ 416(i), 423(d) and 20 C.F.R. § 404.1505 *et seq.*, requires analysis of a host of complex factors. Aside from analyzing how medical diagnoses¹³ impact an individual's ability to work, SSA must also consider an individual's work history.

The amounts of the SGA caps have increased slowly over the years. From 1980 to 1989, the cap was \$300 per month. 20 C.F.R. § 404.1574(2) Table 1. From 1990 to June 1999, the cap was \$500 of earnings per month. *Id.*, etc. If an individual is being paid more than other similarly situated workers receive for it, such activity is considered "subsidized work." 20 C.F.R. § 404.1574 (a)2. Earnings from "subsidized" work do not "count" towards the SGA. 20 C.F.R. § 404.1574 (a) & (a)(2.)

An individual may "work" in a "sheltered workshop." 20 C.F.R. § 404.1573(c), (1)-(6). Work in a sheltered workshop does not count towards a calculation of SGA. Additionally,

¹³ Which SSA contends are not at issue in the present cases, but which Gibler asserts should have been addressed.

impairment related work expenses (IRWE's) are deductible from a presumptive monthly SGA dollar amount.

A parallel exception to those established by the regulations cited above is “sporadic work.”

The reasons for initiating a particular work review are not publicly known. In practice, for any reason and at any time—even arbitrary and capricious reasons—the Agency may begin a work review.

As explained above, earnings of a certain level only raise a presumption of SGA. *Lewis vs. Apfel vs.* 236 F. 3d 533 (9th Cir. 2001); *Corroa vs. Shalala*, 20 F. 3d 934 at 948. (9th Cir. 1994) Many factors must be considered before benefits may be cut off. In addition to the exceptions outlined above, there are multiple “return-to-work” schemes, which permit a recipient to experiment with returning to work before foregoing his benefit checks. Similarly, he may participate in the Ticket-to-work act and work incentive program 42 U.S.C. § 1320 b-19, Pub. L. 106-170, or under SSI rules a beneficiary may keep one dollar for every two dollars earned. 20 C.F.R. § 416.1112 (7) (2004)¹⁴

The congressional policy underlying these work schemes is that the disabled should be encouraged to go back to work and should in no way be discouraged from attempting to work for fear of jeopardizing their benefits. (Ticket To Work Act, *supra*).

Once the Agency has taken into consideration all of the above factors, if it then makes a determination that a disability benefits recipient is engaging in SGA, the Agency may terminate his benefits. But now the burden of proof has

¹⁴ Although this applies to SSI recipients it shows Congress' policy of work incentives. If Gibler had not worked during his life he would not have been ceased because of the “2 for 1” work incentive rule under the poverty program.

shifted. Pursuant to 42 U.S.C. § 423 (f) Disability insurance benefit payments, which also apply to medical reviews, the beneficiary is presumed to continue to qualify for disability status absent a showing of substantial evidence to the contrary. 42 U.S.C. § 423 (g) provides for continuation of benefits pending review simply by requesting it.

Moreover, before benefits can actually be cut off, the Agency must give the beneficiary proper notice. See 20 C.F.R. § 404.1589. Notice must contain certain information, i.e.

“ . . . The advance notice will tell you . . . this work shows you are not disabled.” 20 C.F. R. § 1595(b)(2). Also see 20 C.F.R. § 404.1597(a).

The regulations provide that benefits will not stop if:

“ . . . We will not suspend your cash benefits if . . . (1) The evidence in your file does not clearly show that you are not disabled. . . ” 20 C.F.R. § 404.1596 (c).

B. *Exhaustion*

After receiving an adverse determination, an individual must file a Request for Reconsideration, within 60 days. 20 C.F.R. § 404.909 (a) (1). Within 60 days of a denial of Reconsideration (in this case called a “Notice of Reconsideration,”) a claimant may file a request for hearing before an administrative law judge. It generally takes between six months to two years before the hearing is held. (See District Court Order denying SSA’s Motion to Dismiss dated July 11, 2001. (Appendix Exh. 15, pp. 60-81)

It often takes months (in the case here, four months) for the judge’s decision to be implemented.

After an adverse (or only partially favorable) decision from the Administrative Law Judge, within sixty days, a claimant may seek review from the “Appeals Council,” located in Falls Church, VA. In this case, as neither the Administrative Law

Judge nor the Appeals Council had jurisdiction over due process issues, further applications for relief from either one would have meaningless, there being no further administrative remedies to exhaust.

Moreover, Gibler agreed with the ALJ's decision¹⁵ excepting only the part over which the ALJ had no jurisdiction, the detail relating to the years 1988-1990. This was appealed to the Appeals Council after the ALJ amended his decision. This due process complaint, dismissed with prejudice, is now before this Court (Gibler III). (Appendix Exh. 16, pp. 82-94).

REASONS FOR GRANTING THE PETITION

A. Continuing Due Process Violations

During the pendency of these appeals before the Court of Appeals for the Ninth Circuit, SSA commenced another work review. The period of time SSA proposed to consider in its new work review included, years in the 1990s that had been adjudicated by the Administrative Law Judge in the present two cases in August 2001. SSA did not even oppose Gibler's request for an emergency stay pending appeal.

B. Right to Notice and an Opportunity to Appeal

To cease benefits, the continuing disability review scheme calls for at least a two-step notice procedure: ". . . we will notify you in writing and give you an opportunity to appeal." 20 C.F.R. § 404.1589.

The July 27, 2000, letter from Social Security to Gibler (Appendix Exh. 19, pp. 113-116) clearly was in the nature of the first notice outlined in the regulation cited immediately above. "[W]e will notify you that we are reviewing your

¹⁵ 20 C.F.R. 404.900 (3) provides for administrative review for people who are "dissatisfied" with an ALJ decision.

eligibility for disability benefits and why we are reviewing your eligibility” *Id.*

The second notice, which should have set out the claims representative’s decision and the reasons for it, was never sent. The second notice would have included information on Gibler’s right to appeal. Instead, Gibler’s benefits were summarily cut off on November 1, 2000, before he was ever given any opportunity to appeal. What the second notice should have shown was Social Security’s analysis of Gibler’s earnings history and how the analysis compelled a conclusion that he was engaging in SGA. The second notice should have detailed Gibler’s opportunity to appeal from such an analysis, not simply an invitation to provide further information.

“ . . . We will tell you why we have determined that you are not now disabled, . . . and why this work shows you are not disabled. 20 C.F.R. §§ 404.1595(a); 404.1595(b)(2).

Gibler had no procedural opportunity to challenge the faulty nature of the Administration’s analysis. The only avenue of relief remaining was the filing of a premature “appeal” (Request for Reconsideration) after Gibler’s benefits were cut off. SSA claims representative Donald Worms had never applied the mitigating factors of sheltered work, work subsidies, impairment-related work expenses and sporadic work to Gibler’s work history.

Yet, particularly in light of its own determination of “sheltered work” back in 1987, the SSA was under an obligation to perform such an analysis before termination. The doctrines of *res judicata* and administrative finality apply to social security decisions. Nothing has changed in Gibler’s work or ability to work since the 1987 review. (See ALJ opinion (Appendix Exh. 17, pp. 95-110)

SSA makes much of Gibler’s failure to reply to its July 27, 2000, letter. Yet, in his telephone conference with claims

representative Worms, Gibler had already complied and had no further basic facts to supply about his employers or earnings for the previous 20 years. In addition to obtaining the opinion of Carol Banyas, M.D., the former primary treating psychiatrist, Gibler filed a new application for disability. Without an initial decision from which to appeal, Gibler did all that could be expected. Notice was deficient. See *Dusenbery v. United States*, 534 U. S. 161 (2002).

Before their benefits are cut off, Social Security recipients are entitled to proper notice. *Udd vs. Massanari*, 245 F.3d 1096, 1099-1102 (9th Cir. 2001); *Gonzalez vs. Sullivan*, 914 F.2d 1197, 1203 (9th Cir. 1990). In a case such as Gibler's, involving support for the necessities of life, such due process protections are particularly vital.

C. Right to Fair and Accurate Evidence

In the case below, the Administrative Law Judge considered Gibler's entire work history since 1979. The most troubling part for the ALJ to analyze was Gibler's earnings records for 1988 and 1990 because a reasonable person would not ordinarily be able to recall minute detail from ten to thirteen years ago. Yet the ALJ went so far as to reveal in his opinion that he had doubts about the accuracy of these records: ". . . The self employment income established by the claimant's earnings record appears (on the surface) to be an aberration. . ." (ALJ Opinion.)

The special considerations to which the Administrative Law Judge referred in the passage quoted above were considerations of "impairment-related work expenses,"¹⁶ as sheltered work or sporadic work. Gibler's case would have been greatly bolstered, if he had been able to produce receipts

¹⁶ See the ALJ's comments on page 3 of his August 30, 2001 opinion: "[F]actor such as . . . whether the severity of the individual's impairment or impairments requires" (ALJ Opinion)

for expenses, such as special anti-psychotic medications needed or receipts from taxis taken after rehearsals. Those years were too long ago to reasonably require Gibler to recall.

The Administrative Law Judge noted:

“Regulations at 20 C.F.R. § 404.803 state that after the statutory time limit (3 years, 3 months and 15 days after the end of a tax year), earnings records are conclusive. . . since it is impossible to determine whether special considerations existed in 1988 and 1990. . . .”

(ALJ Opinion.)

This statute of limitations is not reciprocal which means SSA can go back 10, 20, 30 or more years in a retroactive work review termination.

ALL ADMINISTRATIVE REMEDIES WERE EXHAUSTED

An ALJ and the Appeals Council have no jurisdiction outside of the social security act. Therefore, there was no realistic opportunity to make a factual record on constitutional issues beyond the ALJ decision.

SSA takes the position that Gibler failed to exhaust his administrative remedies. This Court has construed the due process clause to require a meaningful opportunity to be heard and present objections before benefits can be taken away or property alienated. Too often, decisions by low-level administrators, unfettered by considerations of fundamental fairness, are ill-conceived, as they are motivated primarily by such concerns as the number of cases processed each month. *Udd vs. Massanari*, 245 F.2d 1096 (9th Cir. 2001).

The facts of the present case demonstrate a wanton disregard of materials that were already contained in the SSA field office files. First, Gibler had already undergone a work review in 1987, wherein SSA had reached the conclusion that Gibler’s sporadic singing in church (and occasionally, other) choirs was in the nature of “sheltered work.” When, in 2000,

district office claims representative, Donald Worms, discussed Gibler's work history with him, Gibler informed Mr. Worms that he continued to earn a very limited income in the same way, and that he was very excitable and nervous. (Appendix Exh. 21 p. 119)

No sooner did the work review process get underway then Gibler was placed in a hospital psychiatric lock-up ward for a period of at least one week.¹⁷ Gibler's hospital discharge papers were submitted to the local SSA office before SSA acted to cut off his benefits. The question of continuing disability should always be raised whenever a social security disability recipient is in a psychiatric lock-up ward.¹⁸

Several times including at a hearing on January 8, 2002 SSA represented that ". . . This cessation was not based on a continuing disability review, it was based on earnings over several years."¹⁹

Yet, the basis for discontinuing Gibler's benefits was that he was working or able to work. SSA's national policy is to ignore medical evidence and it has denied it had to consider medical evidence throughout this litigation contrary to 20 C.F.R. § 404.1595 (b)1 and 404.1596(c)(1).

Goldberg v. Kelly, 397 U.S. 254 (1970) is the seminal case calling for hearings prior to termination of benefits. This case falls within the parameters of *Goldberg* for terminating benefits prior to a hearing as opposed to after and *Bowen, supra* for egregious conduct in disregarding the fact that Gibler was in a lock-up psychiatric ward during the work review.

¹⁷ The record shows that Gibler entered the hospital of California Pacific Medical Center, in San Francisco, discharged on February 18, 2000. (Appendix Exh. 22, p. 120)

¹⁸ "Work," as in engage in SGA, not as in singing for a choir every once in a while.

¹⁹ See Transcript January 8, 2002 (Appendix Exh. 23, pp. 121-125)

Matthew vs. Eldridge, 424 U. S. 319, 342-343 (1976) purported to distinguish disability beneficiaries from welfare recipients and held that claimants of “**modest means and outside resources**” (emphasis added) need not be protected by the stringent standards of a *Goldberg vs. Kelly* hearing. *Id.* Further in support of its holding in *Matthews*, this Court adduced evidence of procedural safeguards in the multi-layered review process including the use of medical professionals.

Congress over-ruled this holding of *Matthews vs. Eldridge, supra*. In the Social Security Disability Benefits Reform Act of 1984, 42 U.S.C. § 423 (f), (g), Congress enacted a provision requiring continuation of benefits pending a “face to face” (hearing officer/judicial) hearing. In *Schweicker vs. Chilicky*, 487 U. S. 415, 415-417 (1988), egregious abuses were noted, e.g. ceasing social security beneficiaries on the very same evidence used to initially determine that they were disabled. Gibler was found disabled based on his new 2001 application for benefits filed in January 2001 *based on the very same evidence used to terminate him*.

Here a medical review was required so as not to violate procedural due process. A long line of cases commonly known as the “treating source rule” whereby a treating doctor’s opinion may not be rejected absent clear and convincing evidence to the contrary.²⁰ A due process violation occurred here when treating psychiatrists’ opinions were disregarded.

THE NINTH CIRCUIT’S DECISION WAS NOT MADE ON THE MERITS

Both the Court of Appeals for the Ninth Circuit and the District Court failed to adjudicate the due process issues squarely raised in the cases below. Yet Gibler is entitled to his day in court.

²⁰ *Moore vs. Commissioner*, 278 F.3d 920 (9th Cir. 2002); *Lester v. Chater*, 81 F. 3d 821, 835 (9th Cir. 1995)

In *Sweierkiewiez v. Sorema*, 534 U.S. 506 (2002), this Court stated “we will not impose heightened pleading standards where Congress has not instructed us to do so . . .” Gibler has both a Fifth Amendment right to access to the courts because SSA is violating the 1984 amendments, *supra* in that benefits are required pending appeal so as not to violate due process.

The courts are needed to determine the fairness of Social Security administrative hearings when, as in the cases here, the evidentiary rules dictated by SSA regulations offend all notions of due process by the treatment of stale evidence (ten to thirteen years old, since 1987) as presumptively correct.

CONCLUSION

Gibler is asking this Court to find that necessities of life cannot be taken away before notice and a meaningful opportunity to be heard consistent with Congress’s amendments giving recipients benefits pending appeal—42. U.S.C. § 423 (g) and the Due Process Clause.

Apparently, the District Court was reluctant to find exhaustion and decide the due process issues on the merits because of administrative ease. Although no depositions were permitted, since SSA concedes it properly followed its national procedure, Gibler submits there are hundreds of thousands of similarly situated people.

Respectfully submitted,

STEVEN BRUCE, *
PEOPLE WITH DISABILITIES
FOUNDATION
507 Polk Street, Second Floor
San Francisco, California 94102
(415) 931-3070

* Counsel of Record

Attorney for Petitioner